In the Court of Appeals of the State of Alaska

Carl R. Takak,
Appellant/Cross-Appellee,

v.

State of Alaska,
Appellee/Cross-Appellant.

Court of Appeals No. **A-13020/A-13029**

Order

Date of Order: **4/20/2020**

Trial Court Case No. **2UT-17-00005CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

Carl R. Takak was convicted of second-degree sexual assault for engaging in sexual contact with K.R. without consent and in reckless disregard of the lack of consent.[1] (Takak was acquitted of first-degree harassment based on this same conduct.[2]) The primary issue presented in this appeal is whether there was sufficient evidence presented at trial to establish that Takak's sexual contact with K.R. was "without consent."[3]

In several recent cases, this Court has addressed the contours of the meaning of "without consent," as that term is defined under Alaska law.[4] This case presents another difficult application of that definition.

The parties have submitted this case to the Court on their briefs, but the briefs were submitted prior to our recent decisions on this topic. Having considered the

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[1] AS 11.41.420(a)(1).

[2] AS 11.61.118(a)(2).

[3] AS 11.41.470(8) (defining "without consent").

[4] *See Inga v. State*, 440 P.3d 345 (Alaska App. 2019); *State v. Mayfield*, 442 P.3d 794 (Alaska App. 2019); *Davis v. State*, 2019 WL 3216603 (Alaska App. July 17, 2019) (unpublished).

parties' briefs and the issues raised in light of this Court's recent jurisprudence, the Court concludes that the resolution of this appeal would benefit from additional input of the parties.

Accordingly, **IT IS ORDERED**:

1. On or before **May 18, 2020**, Takak shall file a supplemental brief addressing the sufficiency of the evidence to support his conviction in light of our recent cases set out in footnote 4 of this order. The brief shall also address the issues set out in point 5 of this order. The supplemental brief need not conform to all of the requirements of Appellate Rule 212, although it must include appropriate citations to the record and to legal authority.

2. After Takak files his supplemental brief, the State will have 30 days to file a supplemental brief. The supplemental brief need not conform to all of the requirements of Appellate Rule 212, although it must include appropriate citations to the record and to legal authority.

3. After the State files its supplemental brief, Takak will have 20 days to file a reply brief.

4. The Court invites the Alaska Public Defender Agency to enter this case as an *amicus curiae*. The Clerk shall serve a copy of this order, as well as electronic copies of the briefs, the non-confidential portion of the trial court record, and the transcript, on the Public Defender Agency. The briefing deadlines for the *amicus curiae* shall be governed by Appellate Rule 212(c)(9).

5. In addition to any issues the parties may wish to address, the parties should address the following issues in their briefs:

(a) In *Inga v. State*, we held that, in the context of sexual offenses, the force that the defendant uses or threatens to use "must be more than simply the bodily impact

or restraint inherent in the charged act of sexual penetration or contact."[5] We further recognized that whether a sexual touching was "coerced by the use of force," for purposes of the sexual assault statutes, is "inherently a fact-intensive inquiry that ultimately turns on the totality of the circumstances present in a given interaction."[6]

The parties should discuss the meaning of "coerced by the use of force" under AS 11.41.470(8)(A) and identify the circumstances that can be considered within this analysis, both generally and in relation to this case. We wish to draw the parties' attention to *State v. Marshall*, 253 P.3d 1017 (Or. 2011), an Oregon Supreme Court case cited in Judge Mannheimer's concurrence in *Inga*.[7]

(b) The jury acquitted Takak of first-degree harassment under AS 11.61.118(a)(2). This statutory provision was enacted in 2010 as part of Senate Bill 222.[8] The legislative history suggests that this provision was intended to be a lesser included offense of second-degree sexual assault.

For instance, the Governor's Transmittal Letter for Senate Bill 222 stated that "the bill will adopt a class A misdemeanor [first-degree harassment] for offensive touching that does not arise to sexual assault in the first, second, or third degree."[9] The Director of the Department of Law's Criminal Division, Susan McLean, later explained to the Senate Finance Committee that the new harassment statute was intended to apply to "those situations in which a . . . victim is subjected to a sexual touching over the

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[5] *Inga*, 440 P.3d at 349.

[6] *Id.*

[7] *Id.* at 353-54.

[8] *See* SLA 2010, ch. 18, § 4.

[9] *See* Governor's Transmittal Letter for Senate Bill 222, 2010 Senate Journal 1238 (Jan. 15, 2010).

clothing but does not have time to voice his or her lack of consent."[10] The sectional analysis for the bill reflected this same intent.[11]

The parties should address the legislative history of AS 11.61.118(a)(2) and discuss the interplay of the verdicts in this case.

Entered at the direction of the Court.

Clerk of the Appellate Courts

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Joyce Marsh, Deputy Clerk

cc: Court of Appeals Judges
Central Staff Attorney
Renee McFarland
Alaska Public Defender Agency
Distribution:

Email:
Cashion, John P
Soderstrom, Donald

[10] *See* Minutes of Senate Finance Comm., Senate Bill 222, testimony of Susan McLean, Director, Crim. Div., Dep't of L., 9:48:15 – 9:48:29 a.m. (Apr. 9, 2010).

[11] *See* Sectional Analysis for Senate Bill 222, § 4 (Apr. 9, 2010) (acknowledging recent prosecutions "involving offensive touchings that occurred so quickly that the court concluded that the victim did not have time to convey lack of consent to the offender").